

APPEAL NO. 020571
FILED APRIL 30, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 13, 2002. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the seventh, eighth, and ninth compensable quarters. Further, because the claimant earlier had been determined not to be entitled to fifth and sixth quarter SIBs, the hearing officer concluded that the claimant had permanently lost entitlement to SIBs, pursuant to Section 408.146(c), because he was not entitled to SIBs for twelve consecutive months. The claimant appealed the hearing officer's determinations on sufficiency grounds, arguing that he made a good faith effort in the qualifying periods for each of the SIBs quarters, given his physical condition. The respondent (carrier) responded, requesting affirmance.

DECISION

Affirmed in part, reversed and rendered in part.

The hearing officer did not err in determining that the claimant was not entitled to SIBs for the seventh compensable quarter¹. It is undisputed that the claimant met the threshold eligibility requirements: (1) he had an impairment rating of 15% or greater; (2) he had not commuted his impairment income benefits; and (3) he earned less than 80% of his average weekly wage during the qualifying periods in issue. See Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b)(1) (Rule 130.102(b)(1)) (general eligibility requirements). In addition, the hearing officer made a finding that the claimant's under- and unemployment during the relevant time frame was a direct result of his compensable injury.

While another fact finder may have reached a different conclusion, the hearing officer found that the claimant neither worked nor searched for work commensurate with his ability during the qualifying period for the seventh compensable quarter. Although the hearing officer comments on the fact that the claimant did not seek employment each week that he was not employed during the qualifying period for the seventh quarter², she seems to base her conclusion of ineligibility on her determination that the work the claimant actually performed was not commensurate with his ability. The hearing officer is the sole judge of the weight and the credibility to be given the evidence. Section 410.165(a). Upon our review of the record, we conclude that the hearing officer's determination that the claimant did not make a good faith search for employment commensurate with his ability and is thus not eligible for seventh quarter SIBs, is supported by the evidence, and that it

¹The qualifying period for the seventh compensable quarter began March 30, 2001, and ended June 29, 2001, and the compensable quarter began July 13, 2001, and ended October 10, 2001.

²The claimant was not required to seek employment for each week of a qualifying period he did not work if he worked commensurate with his ability during that qualifying period.

is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 001360, decided July 27, 2000.

The hearing officer erred, however, in determining that the claimant was not entitled to SIBs for the eighth³ and ninth⁴ compensable quarters, and thus permanently ineligible for SIBs under Section 408.146(c). The claimant proceeded under the theory that he was totally unable to work during the qualifying periods for the eighth and ninth compensable quarters; thus, Rule 130.102(d)(4) was dispositive of his eligibility for SIBs for those quarters. Rule 130.102(d)(4) reads:

- (d) Good Faith Effort. An injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee:
 - (4) has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work[.]

After having increased pain in his lumbar spine, the claimant had a myelogram dated June 22, 2001, about which he received a report and instruction from his doctor on June 28, 2001, which instructed that the claimant should not be working, as he had severe spinal stenosis at L3-4, secondary to (a previous) disk herniation and facet changes. This entry also advises of the need for surgery. The claimant and his doctor began the spinal surgery approval process during the qualifying period for the eighth quarter, on July 31, 2001. The spinal surgery was approved during the qualifying period for the ninth quarter, on October 29, 2001, the Texas Workers' Compensation Commission issued the approval letter on January 15, 2002, and the surgery was then scheduled for March 22, 2002. The claimant presented medical records from his treating doctor, several entries in which could have constituted a "narrative," but most compelling is the entry dated October 29, 2001, which explains that the claimant has a serious lumbar condition, causing him pain, that could become worse if he worked. The entry also advises that because the claimant must take "large amounts of medication" for his pain, he should not be "driving or be on unprotected heights." The entry further points to the fact that the doctor and the claimant are awaiting approval for the required spinal surgery.

The hearing officer discussed in her Statement of the Evidence that there was an

³The qualifying period for the eighth compensable quarter began June 30, 2001, and ended September 28, 2001, and the eighth compensable quarter began October 12, 2001, and ended January 10, 2002.

⁴The qualifying period for the ninth compensable quarter began September 29, 2001, and ended December 28, 2001, and the ninth compensable quarter began January 11, 2002, and ended April 11, 2002.

“other record,” a functional capacity evaluation (FCE) dated August 19, 1999, showing that the claimant had an ability to perform light work. Inexplicably, she also wrote that “it did not appear from the medical records presented that his condition was appreciably worse when compared to his condition at the FCE.” One need only examine the medical records from the time of the FCE and compare them with those closer in time to the relevant qualifying periods to discern that the claimant experienced a fairly serious degeneration of his back condition, so much so that he required yet another spinal surgery. The FCE notes that the claimant was recovering from his 1996 spinal surgery without problem. Thus, the FCE should be disregarded here, as it is too remote in time and there was a substantial change in the claimant’s condition, as demonstrated in the medical records (particularly those nearest the qualifying periods in issue). All of the medical records even remotely related to the qualifying periods at issue show that the claimant had a severe lumbar problem; that he could not work because of his injury and the resultant medication he was required to take for his pain; and that he required further corrective spinal surgery. The claimant has met the good faith standards of Rule 130.102(d)(4), and thus is entitled to SIBs for the eighth and ninth compensable quarters. Therefore, we reverse the decision of the hearing officer, and we render a new decision that the claimant is entitled to SIBs for the eighth and ninth compensable quarters.

Because we have reversed the hearing officer’s determination regarding the claimant’s eligibility for SIBs for the eighth and ninth compensable quarters, we likewise reverse her determination that the claimant has permanently lost his entitlement to SIBs, because he was not entitled to SIBs for twelve consecutive months, pursuant to Section 408.146(c). The evidence in the record shows that the claimant was entitled to SIBs for the fourth compensable quarter, but not for the fifth or sixth compensable quarters. We affirm the hearing officer’s determination regarding the claimant’s ineligibility for SIBs for the seventh compensable quarter, but reverse and render that the claimant is eligible for SIBs for the eighth and ninth compensable quarters. Accordingly, the claimant has not been ineligible for SIBs for twelve consecutive months, and as such has not permanently lost his entitlement to SIBs. Therefore, we reverse the hearing officer’s conclusion that the claimant has permanently lost entitlement to SIBs, and render a decision that the claimant has not permanently lost entitlement to SIBs.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**MR. RUSSELL R. OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.**

Terri Kay Oliver
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Michael B. McShane
Appeals Judge